

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

November 14, 2007 Session

**STATE OF TENNESSEE v. BRANDON KEITH OSTEIN and  
TERESA GALE FOXX**

**Appeal from the Criminal Court for Davidson County  
No. 2006-A-568 Monte Watkins, Judge**

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**No. M2007-00925-CCA-R9-CO - Filed May 29, 2008**

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In this interlocutory appeal, Appellant, the State of Tennessee, challenges a Davidson County trial court's grant of a motion to reveal the identity of a confidential informant. The confidential informant provided information about drug activity that led to the arrest and subsequent indictment of Appellees Teresa Gale Foxx and Brandon Keith Ostein. The trial court concluded that the confidential informant was a material witness whose identity must be disclosed because the confidential informant supplied information to police which led to the execution of a search warrant. After a review of the record and applicable authorities, we determine that the trial court erroneously granted the motion. Consequently, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Reversed and  
Remanded.**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and JOHN EVERETT WILLIAMS, JJ., joined.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Hugh Ammerman, Assistant District Attorney General, for the appellant, State of Tennessee.

Eugenia R. Grayer, Nashville, Tennessee, for appellee, Teresa Gale Foxx and Wendy S. Tucker, Nashville, Tennessee, for appellee, Brandon Keith Ostein.

## OPINION

### Factual Background

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On March 3, 2006, the Davidson County Grand Jury indicted Teresa Gale Foxx, Brandon Keith Ostein, Darryl Lamont Haley, Marcus DeWayne McCarrol, Travis Leveal Person, and Bobby Lee Robinson with possession of 300 grams or more of cocaine with the intent to sell or deliver and possession of drug paraphernalia with the intent to prepare and package a controlled substance. Darryl Lamont Haley was also charged with tampering with evidence. The events that formed the factual basis for the indictment took place on November 10, 2005, after a search warrant was served at a residence located at 1222 14<sup>th</sup> Avenue South in Nashville, Tennessee. The search warrant was procured based on information provided by a confidential informant to law enforcement officials.

After the return of the indictment, Appellees Ostein and Foxx filed motions to compel the identity of the confidential informant. They argued that the identity of the confidential informant was material to their defense and crucial to their right to confront and cross-examine witnesses.

The trial court conducted a hearing on the motion to disclose the identity of the confidential informant on March 23, 2007. At the hearing, the trial court heard testimony from Detective Johnnie E. Melzoni of the Nashville Police Department. Detective Melzoni testified that he obtained a search warrant for 1222 14<sup>th</sup> Avenue South based on information obtained from a confidential informant. According to Detective Melzoni, the confidential informant witnessed drug activity and saw a large amount of cocaine inside the residence. Appellee Ostein, also known as “Snake,” and other persons were seen in possession of cocaine and other drugs. Specifically, according to the application for the search warrant, the confidential informant witnessed Appellee Ostein “cooking powder cocaine and making it crack cocaine inside the residence.” The confidential informant also saw Appellee Ostein in possession of a large amount of cash. The information provided by the confidential informant was based on personal observations that occurred within seventy-two hours prior to the application for the search warrant. The search warrant was signed on November 5, 2005, and executed on November 10, 2005.

Detective Melzoni stated that he spoke with the confidential informant about one hour prior to executing the search warrant. The confidential informant told Detective Melzoni that he saw Appellee Ostein cooking crack in the kitchen area of the house earlier that day. Detective Melzoni could not specify the time of day that the observation occurred. However, Detective Melzoni informed the trial court that the confidential informant was not present during the execution of the search warrant.

The search warrant was executed at around 4:30 p.m. on November 10, 2005. Detective Melzoni testified that Appellee Ostein was inside the residence at the time of the search but that he and four other people fled the house as soon as the police announced their presence.

Police recovered various items during the search. Specifically, in the tank of the upstairs toilet, police recovered a white powder substance that weighed 128 grams that field-tested positive for cocaine. The police also recovered twenty-eight grams of cocaine from the bottom of the toilet bowl. Detective Melzoni testified that it looked like someone had tried to “flush” this cocaine down the toilet. One of the bedrooms contained a bag with .1 grams of cocaine inside.

In the kitchen, police found a “plastic bag of white rock-like substance . . . that weighed approximately a hundred and twenty-eight grams.” This substance also field-tested positive for cocaine. On the counter in the kitchen, there was a plastic bag with white residue inside. There was over \$3,000 in the kitchen along with a set of digital scales containing white residue. The police also found seven boxes of baking soda and a loaded .38 caliber revolver.

On the outside porch, police recovered a bag of white rock-like substance weighing approximately 106 grams. One of the people arrested was carrying 2.9 grams of cocaine on his person. Appellee Ostein was found in possession of a cell phone, \$1750 in cash, and an orange necklace that contained a key to the residence.

According to the investigative report compiled by Detective Melzoni, Appellee Foxx’s name was on the lease for the residence. After the execution of the search warrant, Appellee Foxx stated to authorities that she let Appellee Ostein and another defendant cook and sell crack from her apartment in exchange for payment of some of her bills, including rent. Appellee Ostein claimed that he did not know anything about the drugs, money, or guns at the residence. The other defendants gave conflicting stories about the drugs, money, and guns located at the residence.

At the conclusion of the hearing, the trial court took the matter under advisement. In an ordered entered on April 12, 2007, the trial court found that there was probable cause for the issuance of the search warrant. Further, the trial court granted the motion to disclose the identity of the confidential informant, determining that the “identity of the confidential informant [was] material to the defense and should be disclosed.”

After the grant of the motion to disclose the identity of the confidential informant, the State sought interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. This Court granted the application for interlocutory appeal on June 6, 2007.

### *Analysis*

On appeal, the State argues that the trial court erred by ordering the State to divulge the identity of its confidential informant because the “Defendants failed to prove that the informant was a material witness.” Specifically, the State alleges that Appellee Ostein and Appellee Foxx failed to demonstrate that the testimony of the confidential informant would be favorable to the defense. Further, the State contends that the trial court “relied upon allegations of what the informant saw on previous occasions and concluded that the informant was therefore a material witness.” According to the State, these allegations were relevant *only* to the validity of the search warrant, rather than the

commission of the crimes as alleged in the indictment. Appellee Ostein and Appellee Foxx, on the other hand, insist that the trial court properly ordered the State to disclose the identity of the confidential informant because the confidential informant was certainly a material witness whose testimony and identity are necessary to assist in the preparation of an adequate defense.

Generally, the identity of a confidential informant is privileged from disclosure. *House v. State*, 44 S.W.3d 508, 512 (Tenn. 2001); *State v. Vanderford*, 980 S.W.2d 390, 395 (Tenn. Crim. App. 1997). In *Vanderford* this Court recognized that although the identity of a confidential informant is not discoverable where the defendant's sole purpose is attacking the validity of a search warrant, the privilege is not absolute. 980 S.W.2d at 395-96. In the case herein, Appellee Ostein argues on appeal that he is not seeking the identity of the confidential informant in order to attack the search warrant because he challenged the search warrant at the same hearing without making the identity of the confidential informant an issue. Appellee Ostein contends that the informant can establish that "other persons were in possession of cocaine in this resident [sic] near the time of the search warrant" which is "critical" information to the defense because Appellee Ostein was "not in possession of any drugs or paraphernalia at the time that officers entered the home, which was not his residence." Appellee Foxx does not specifically allege what information the confidential informant could provide that would assist in the preparation of her defense, she merely argues that the identity of the informant is "material" and that the trial court properly ordered the State to disclose the identity of the confidential informant.

Reviewing the evidence and argument provided at the hearing on the motion, we note that first and foremost, the Appellees did not establish by a preponderance of the evidence that the confidential informant's identity was material to their defense because the informant was a witness to the crime, participated in the crime, or possessed facts favorable or relevant to them. *See Vanderford*, 980 S.W.2d at 397. At the hearing, counsel for Appellee Ostein focused on the facts provided by the confidential informant to the police prior to the application for the search warrant. Counsel for Appellee Ostein stated that it was important to reveal the identity of the confidential informant because the informant had "seen Mr. Ostein and other persons in possession of drugs in this home" and that the confidential informant was a "witness to the crime." Counsel for Appellee Ostein also stated that the "only information linking [Appellee Ostein] to those drugs, other than mere presence - - which, as the Court knows isn't enough - - is this confidential informant." Counsel for Appellee Foxx argued that the identity of the confidential informant was essential to her defense because "this informant never mentions [her] name and/or description" and the confidential informant's "observations are used to procure a search warrant for [her] residence" when the confidential informant was there prior to the issuance of the warrant and prior to the execution of the warrant. In its order granting the motion, the trial court noted that:

[T]he CI [confidential informant] reported observing the defendant Ostein in the kitchen cooking on previous occasions and on that day. Defendant Ostein was not observed personally by the officers in the kitchen cooking cocaine but was observed running out of the front door. Officer Melzoni was not sure what time the CI saw defendant Ostein in the kitchen. The CI also reported observing other individuals at

the residence but did not indicate any names. The confidential informant is a material witness to the activity of defendants Ostein and Foxx. The confidential informant reported observing the defendant Ostein “cooking crack” in the kitchen to Officer Melzoni which he relied on in obtaining the warrant.

It is clear that the trial court relied on allegations of what the informant saw on previous occasions to make its determination that the confidential informant was a material witness. The observations made by the confidential informant were used only to obtain the search warrant, not to obtain the indictment against Appellees. Presumably, the State’s case against Appellees will be based on information and evidence that the police obtained during the November 10, 2005 search of the residence, not the testimony or observations that the police received from the confidential informant prior to the application for the search warrant. In other words, we determine that the confidential informant’s observations herein could only be relevant to the validity of the search warrant. As noted, this Court has held that a challenge to the validity of a search warrant is not a proper reason for disclosing the identity of a confidential informant. *See State v. Ash*, 729 S.W.2d 275, 278 (Tenn. Crim. App. 1978); *see also Vanderford*, 980 S.W.2d at 396; *State v. Taylor*, 763 S.W.2d 756, 760 (Tenn. Crim. App. 1988). The trial court erred in granting the motion to disclose the identity of the confidential informant as a material witness. Accordingly, the judgment of the trial court is reversed.

#### *Conclusion*

For the foregoing reasons, the judgment of the trial court is reversed and the case remanded for further proceedings consistent with this opinion.

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JERRY L. SMITH, JUDGE